

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE:)
) CA No. 01-12257-PBS
PHARMACEUTICAL INDUSTRY AVERAGE) CA No. 08-11200-PBS
WHOLESALE PRICE LITIGATION) CA No. 10-11186-PBS
) Pages 1 - 47

EVIDENTIARY HEARING

BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES CHIEF DISTRICT JUDGE

United States District Court
1 Courthouse Way, Courtroom 19
Boston, Massachusetts 02210
April 16, 2013, 9:15 a.m.

LEE A. MARZILLI
OFFICIAL COURT REPORTER
United States District Court
1 Courthouse Way, Room 7200
Boston, MA 02210
(617) 345-6787

1 A P P E A R A N C E S:

2 PETER E. GELHAAR, ESQ., Donnelly, Conroy & Gelhaar, LLP,
3 One Beacon Street, 33rd Floor, Boston, Massachusetts, 02108,
4 for Baxter International, Inc.

5 DAVID J. CHIZEWER, ESQ. and BEATA BREWSTER, ESQ.,
6 Goldberg Kohn, Ltd., 55 East Monroe Street, Suite 3300,
7 Chicago, Illinois, 60603, for Sun and Hamilton.

8 FREDERICK M. MORGAN, JR., ESQ., Morgan Verkamp, LLC,
9 700 Walnut Street, Suite 400, Cincinnati, Ohio, 45202,
10 for Sun and Hamilton.

11 JAMES J. BREEN, ESQ., The Breen Law Firm,
12 3562 Old Milton Parkway, Alpharetta, Georgia, 30005,
13 for Ven-A-Care of the Florida Keys.

14 C. JARRETT ANDERSON, ESQ., Anderson, LLC,
15 1409 Wathen Avenue, Austin, Texas, 78703, for Ven-A-Care
16 of the Florida Keys.

17 J. ANDREW JACKSON, ESQ. and MERLE M. DeLANCY, JR., ESQ.,
18 Dickstein Shapiro, LLP, 1825 Eye Street, N.W., Washington,
19 D.C., 20006-5403, for Baxter International, Inc.

20 ALSO PRESENT: Dr. John Lockwood, Mark Jones, Luis Cobo
21
22
23
24
25

P R O C E E D I N G S

THE CLERK: Court calls Civil Action 01-12257, Sun v. Baxter Healthcare. Could counsel please identify themselves.

MR. JACKSON: Andy Jackson for Baxter, your Honor.

MR. DeLANCEY: Merle DeLancey for Baxter.

MR. GELHAAR: Peter Gelhaar for Baxter.

MR. CHIZEWER: Good morning, your Honor. Dave Chizewer on behalf of the relators, Sun/Hamilton. With me is my colleague, Beata Brewster. She doesn't have a formal appearance in the case, but she's been helping out.

MR. MORGAN: Frederick Morgan for Ms. Sun and Mr. Hamilton, your Honor.

MR. TURETZKY: Matthew Turetzky for Baxter.

MR. ANDERSON: Jarrett Anderson for relator, Ven-A-Care.

MR. BREEN: Jim Breen for relator, Ven-A-Care of the Florida Keys. With me, your Honor, is Ven-A-Care's representative today, Dr. Lockwood, John Lockwood to my right. He's also provided a declaration in this matter. And also present is Ven-A-Care's current president, Mark Jones, who also provided a declaration in this matter. Also present is Ven-A-Care's initial president and founder, a pharmacist, Luis Cobo, in the event that the Court or anybody has any questions regarding some of the earlier days of this matter.

THE COURT: All right, so who's the first witness?

1 THE CLERK: You can all be seated.

2 THE COURT: Thank you.

3 MR. CHIZEWER: Your Honor, on behalf of Sun/Hamilton,
4 at the telephonic status hearing that we had in March, your
5 Honor, your Honor provided us, all parties, the opportunities
6 to submit briefs in advance of this hearing --

7 THE COURT: Yes.

8 MR. CHIZEWER: -- which we've obviously done, and I
9 think that had the effect of solidifying the issues. I don't
10 believe that there is any contested issues of fact. We've
11 reviewed the declarations of Mr. Lockwood and Mr. Bradley.
12 We've tendered a small amount of testimony from the 30(b)(6)
13 deposition. Mr. Bradley was the deponent in that deposition.

14 THE COURT: So is that this book?

15 MR. CHIZEWER: That is --

16 THE COURT: It's a big -- in other words, when you say
17 you're tendering, you mean by quoting from it?

18 MR. CHIZEWER: Correct, your Honor.

19 THE COURT: And that's in the appendix?

20 MR. CHIZEWER: That is in the appendix.

21 THE COURT: Everything. So you don't want to put on a
22 witness?

23 MR. CHIZEWER: Mr. Hamilton is here if your Honor had
24 specific questions, but we're not relying on any testimony from
25 Mr. Hamilton in our first-to-file position.

1 THE COURT: All right, well, if you don't want to put
2 him on, then it's not there. So his credibility, in your view,
3 I don't have to decide his credibility?

4 MR. CHIZEWER: That's correct.

5 THE COURT: Unlike what was said at the hearings.

6 MR. CHIZEWER: Well, the other parties said they
7 wanted to contest Mr. Hamilton's credibility. I didn't know
8 exactly what that meant. I didn't want to prevent them the
9 opportunity from putting him on the stand if that's what they
10 felt they wanted to do, which is why Mr. Hamilton is here; but
11 it was our position all along that we thought this could be
12 resolved on --

13 THE COURT: Well, are you willing to accept his
14 credibility? You were the ones who challenged it on the
15 conference call.

16 MR. JACKSON: Your Honor, there is no testimony by
17 Mr. Hamilton. If he were to take the stand and testify, I
18 guess we would cross-examine.

19 THE COURT: I thought that there was an offering of
20 his deposition testimony. You didn't offer anything.

21 MR. CHIZEWER: We did. The opposing parties did quote
22 a little bit from his deposition testimony. And he's a party
23 to the case, so it's admissible, and it is what it is. It's a
24 small amount.

25 THE COURT: Let me put it this way: I'm feeling a

1 little frustrated here because when we were on the conference
2 call when people didn't fly in, there was a challenge to
3 credibility. Are you challenging their witness's credibility?

4 MR. CHIZEWER: No, your Honor.

5 THE COURT: Are you -- who was it? I thought it was
6 defendants who made a big pitch that they weren't willing to
7 accept the credibility of the evidence that I thought it was
8 Mr. Hamilton was putting on.

9 MR. JACKSON: But at the time, your Honor, he hadn't
10 tendered any evidence, and he still hasn't. You ordered us to
11 submit direct testimony by, I guess, a week or so ago.

12 THE COURT: Yes.

13 MR. JACKSON: They did not, so Mr. Hamilton's
14 testimony isn't before you. We followed the Court's direction.
15 Mr. Bradley's direct testimony has been submitted. Ven-A-Care
16 has submitted direct testimony. But if the plaintiff is not
17 going to use Mr. Hamilton's testimony --

18 THE COURT: Then you are not challenging anything in
19 the deposition cites that were presented?

20 MR. JACKSON: I am not, your Honor.

21 THE COURT: Because you are the ones who primarily
22 presented them. Or both sides did, right?

23 MR. JACKSON: Very little. We presented mostly the
24 testimony, the direct testimony of Mike Bradley, who is a
25 Baxter employee.

1 THE COURT: Are you challenging his credibility? You
2 said "no."

3 MR. CHIZEWER: No.

4 THE COURT: All right.

5 MR. CHIZEWER: Only to the extent that we submitted
6 some portions of --

7 THE COURT: So I am going to, as Mr. Breen -- you're
8 the one I know, so I don't want to insult anyone else. Are you
9 willing to accept the credibility of all the testimony that
10 we've seen submitted?

11 MR. BREEN: Your Honor, again, as my brother counsel
12 have said, when we had the telephone conference, it was our
13 understanding that we were directed to present direct testimony
14 by declaration. Those parties interested in doing so have done
15 that. There is no testimony from Mr. Hamilton that's being
16 proffered that we would cross-examine. We did take his
17 deposition, and we had a full opportunity to confront him in
18 that deposition. Mr. Anderson did that. So I don't anticipate
19 the need to --

20 THE COURT: So nobody wants to put on a witness
21 basically?

22 MR. BREEN: Our witnesses are here, your Honor. We're
23 not allowed to put our witnesses on. We've done it by direct
24 declarations.

25 THE COURT: That's what I'm saying: No one wants to

1 challenge anybody's testimony. I'll take all testimony as
2 true.

3 MR. JACKSON: That's correct, your Honor.

4 THE COURT: Okay.

5 MR. BREEN: Assuming Sun/Hamilton rests, that's
6 correct, your Honor.

7 THE COURT: Well, there's no resting. They haven't
8 submitted anything.

9 MR. BREEN: But, your Honor, it is our position that
10 they've got the burden. They're moving pursuant to Rule 60.

11 THE COURT: They do have the burden to establish
12 jurisdiction, but they haven't submitted anything, so it's
13 whatever they cited from the deposition, as long as --

14 MR. BREEN: That's my understanding, Judge.

15 THE COURT: Okay, so then let's just argue the case.
16 All right, no testimony. That's where everybody is? Everybody
17 can -- I don't know why we held that conference call. I don't
18 know why, once you decided not to submit any testimony,
19 everybody else brought in theirs. But you're here. Let's go.
20 And if some issue comes up, we have all the witnesses here to
21 put them on the stand and figure it out.

22 MR. CHIZEWER: So, your Honor, our first-to-file
23 position has been tendered to your Honor legally in the briefs.
24 I don't want to repeat what's in the briefs. I'm sure your
25 Honor is familiar with them. I do want to raise about three

1 essential issues. The first goes to this issue about the
2 burden of proof. We certainly are aware that in a typical
3 case, at the beginning of a case, it's the plaintiff's burden
4 to establish jurisdiction. We think there is no jurisdictional
5 issue on the face of our complaint, and I think it's important
6 to consider the matter in which the jurisdictional issue has
7 arisen here.

8 Baxter filed a motion for summary judgment in the
9 Sun/Hamilton matter asking that this Court award it summary
10 judgment, not on a jurisdictional issue but rather on the issue
11 that, their position that the claims had been previously
12 settled.

13 THE COURT: So you don't think you have to prove that
14 you were the first to file?

15 MR. CHIZEWER: We believe that at this point, to the
16 extent -- certainly to the extent -- we think that it's been
17 waived because Baxter actually asked for and received a
18 judgment essentially on the merits, in the sense that your
19 Honor ruled that the case was settled. It was imperative on
20 them and incumbent on them, if they had a jurisdictional issue,
21 to raise it and not ask that they actually be awarded summary
22 judgment. They were awarded summary judgment, and then your
23 Honor ruled that because of that summary judgment and the
24 settlement, that the settlement was an alternate remedy, and
25 that Sun/Hamilton were either entitled to a portion of the

1 proceeds or a fairness hearing. Baxter didn't like that
2 result, and so now they're essentially trying to contest the
3 jurisdiction of the judgment that they asked the Court to
4 enter.

5 THE COURT: So say I were to hold a fairness hearing
6 and you were second to file, so why would you get a penny?

7 MR. CHIZEWER: Well, the fairness hearing is not over
8 the issue of who's first to file.

9 THE COURT: Why?

10 MR. CHIZEWER: The fairness hearing would be over the
11 issue of whether the settlement was adequate to cover the
12 claims, the Sun/Hamilton claims that were settled.

13 THE COURT: Even if you had -- but wouldn't -- this is
14 a procedural pretzel. I said that, and I stick with that. But
15 if in fact you were clearly the second to file, why in a
16 fairness hearing would you be entitled to a penny? Why, even
17 if it's not a jurisdictional issue, isn't it a dispositive
18 issue?

19 MR. CHIZEWER: If it's not a jurisdictional issue,
20 then it was waived. However, my only point, Judge, and I'm
21 sorry to --

22 THE COURT: No, no, go ahead. You're saying it's
23 utterly irrelevant, and I'm not sure I'm going there.

24 MR. CHIZEWER: Well, I understand your Honor is not
25 going there, but at the very minimum, to suggest that we have a

1 burden to prove jurisdiction that is higher than we would
2 normally have to show jurisdiction, which I think is what
3 Ven-A-Care is arguing in their papers -- they're arguing that
4 not only is it our burden to show jurisdiction, which you can
5 normally show by a preponderance of the evidence by showing
6 within your complaint that there was just any basis for the
7 court proceeding in the way that it did, that we have some
8 higher burden.

9 THE COURT: I see. So you're just arguing pretty much
10 against the higher burden.

11 MR. CHIZEWER: Well, yes, and certainly against the
12 higher burden at the very least, to the extent that the whole
13 jurisdictional issue was not waived once the Court actually
14 entered a judgment against us on the merits. The first-to-file
15 issue is supposed to be raised at the beginning of the case
16 anyway.

17 THE COURT: This is coming up in the oddest possible
18 posture, I grant you, but I'm now trying to figure out what to
19 do with it, since it is unclear to me that you would have been
20 the first to file.

21 MR. CHIZEWER: So the second issue -- I just wanted to
22 make clear for the record what our position was on the burden.

23 THE COURT: That you don't think it should be a
24 heightened, and you think it's possibly waived?

25 MR. CHIZEWER: Correct.

1 THE COURT: All right.

2 MR. CHIZEWER: The second point, your Honor, is that
3 the way to determine first to file is simply by comparing the
4 complaints of the two cases. Ven-A-Care in fact has already
5 taken that position in this case. They made a filing in
6 response to our 60(b)(6) motion, and on Page 12 of that filing
7 they said, and it's something we agree with and I'll quote:
8 "To determine whether a qui tam action is barred by 3730(b)(5),"
9 which is the first-to-file provision, "a court need only
10 compare the claims in the later-filed action with the claims in
11 the original relator's complaint." That was Ven-A-Care's
12 statement. In addition, although I don't believe the
13 Department of Justice is represented here today, they filed --

14 THE COURT: Can we stop. Is anyone here from the
15 Department of Justice? No, and they have not filed anything.

16 MR. CHIZEWER: Not in connection with this hearing,
17 but they have filed in the Ven-A-Care case in these proceedings
18 a statement of interest that they filed in a previous case and
19 which they stand by, in which they made very clear their
20 position, and the first-to-file bar is in essence to protect
21 the government. Their position is consistent with what
22 Ven-A-Care said, which is that you determine first to file
23 simply by comparing the complaints in the respective cases, and
24 that anything turned up in the investigation afterwards on
25 either of the cases is irrelevant.

1 THE COURT: But don't under subject matter
2 jurisdiction -- that may be true right from the get-go, but I'm
3 supposed to continue to consider jurisdiction as the case goes
4 on.

5 MR. CHIZEWER: I don't believe so, your Honor. I
6 think the subject matter jurisdiction is at the time that the
7 cases are filed.

8 THE COURT: I thought there was a Supreme Court case
9 that said I keep looking, and if it turns out later I don't
10 have jurisdiction based on the record, I have to continue to
11 examine it. You would say "no"? I mean, because here's the
12 problem: On the face of the complaint, they're two different
13 named drugs, so that in your view would be the end of the
14 story. But then it turns out it's virtually the same drug and
15 the same division and the same, you know, people selling it.
16 So while they're different names on the face of the complaint,
17 you could have a serious argument about the essential facts.

18 MR. CHIZEWER: In this jurisdictional posture, this is
19 not like diversity jurisdiction or federal question
20 jurisdiction, which is something that you -- it's completely
21 inherent to whether the court should proceed at all. In this
22 type of situation, the government, looking at both complaints,
23 really is trying to make a determination as to which one they
24 should go forward with based on what's in the complaints. Once
25 they start to investigate, anything can happen in the

1 investigation. And then to try and take the -- figuring out
2 what's happening in the investigation and try and then push it
3 back to which complaint helped them develop that particular --

4 THE COURT: So you're saying the mere fact that
5 they're different names of the drugs is enough to just win you
6 the day for jurisdiction forever?

7 MR. CHIZEWER: Well, we --

8 THE COURT: Because if you compare it -- I mean,
9 Baxter did a nice job of comparing the two complaints -- they
10 look quite similar other than the name of the drug.

11 MR. CHIZEWER: I would disagree that they are similar
12 at all, your Honor, because --

13 THE COURT: Why? Other than the name of the drug, I
14 grant you that, that's a biggy for you, but on the face of
15 it --

16 MR. CHIZEWER: On the face of it, we believe that
17 Ven-A-Care's complaint simply makes generic, boilerplate
18 allegations that are interchangeable between their claims
19 against Baxter and any one of the other about a dozen
20 defendants, independent defendants that they named in their
21 case. Whereas, the Sun/Hamilton claim actually references
22 specific conduct by Baxter, by Baxter employees, Baxter
23 meetings, independent information about Baxter, and specific
24 information about how Baxter reported the pricing of their
25 drugs to First DataBank. None of that specific information --

1 we would say those are the essential facts of the case. None
2 of those --

3 THE COURT: So the level of detail about what the
4 fraud was.

5 MR. CHIZEWER: Right, but I think it's more than just
6 a level of detail. I think it's comparing the essential detail
7 versus no detail. And if you look at the *Duxbury* decision --

8 THE COURT: I did.

9 MR. CHIZEWER: Okay, Mr. Duxbury --

10 THE COURT: Those are different in kind.

11 MR. CHIZEWER: Well, no, no. Mr. Duxbury made a claim
12 to have alleged an off-label scheme, and in his complaint he
13 alleged against Ortho Biotech -- and he was actually an
14 employee of Ortho Biotech -- he alleged an off-label marketing
15 scheme whereby they were marketing a dosage of Procrit of
16 40,000 units that was not approved by the FDA, that they were
17 marketing it to their customers and then convincing their
18 customers to submit claims for reimbursement of that unapproved
19 dose. Those are clearly the outlines of an off-label claim,
20 naming actually the drug and in fact the specific dosage; and
21 yet those allegations, which clearly would have put the
22 government on notice of an off-label claim in the generic
23 sense, was not sufficient under the First Circuit's decision
24 for Mr. Duxbury to be first to file. It was, rather, the later
25 complaint which alleged the specific inside conduct that went

1 on inside of Ortho Biotech that made Mr. Duxbury, even though
2 he was first in time, not first to file, and they ruled in
3 favor of the second relator in that case.

4 Here, if you look at the declarations that have been
5 submitted here, there is no evidence submitted and there are no
6 allegations that Ven-A-Care ever even had any interaction with
7 Baxter whatsoever with respect to these products, that Baxter
8 ever marketed those products to them directly, in writing or in
9 live communication.

10 THE COURT: No. They simply took the list price
11 versus the actual price.

12 MR. CHIZEWER: Right, they just have a list. And,
13 your Honor, they clearly had the list prices, so we're not
14 going to contest that. And if all they needed to do was come
15 up with a list price of a dozen different defendants' drugs --

16 THE COURT: Which was being reported in First
17 DataBank, and then the difference between what the market was
18 actually paying specific to a drug.

19 MR. CHIZEWER: Right, they had that information.
20 There's no question about that. And so if that's all they
21 needed to be first to file was just a spread, then this case
22 is -- I assume that you're going to rule in their favor. But
23 under the decision in *Duxbury*, I don't know how you can get to
24 that decision because there's no -- there's more to an AWP case
25 than a pricing spread. Mr. Breen has said that before.

1 THE COURT: But the thing that's confusing me the most
2 about it is, you're claiming I don't even need to do that, that
3 you don't have to establish jurisdiction to file.

4 MR. CHIZEWER: Well, we are certainly -- we're here on
5 the first-to-file position, so we are --

6 THE COURT: I didn't get that from your brief, let me
7 just put it that way. You did assert waiver. I get that, but
8 I didn't know that you were claiming that you didn't even have
9 to establish jurisdiction to reopen under Rule 60.

10 MR. CHIZEWER: Okay. Well, I guess that's separate
11 from what -- right now what I'm arguing in comparing the
12 complaints, I am delving into the jurisdictional position. I'm
13 taking it as a given that we do have to, for the purposes of
14 this hearing, that we do have to establish jurisdiction.

15 THE COURT: But just going back to your first
16 argument, which totally took me by surprise, I understand that
17 you've claimed that they've waived it. You did raise that in
18 your brief. But I'm now confused. You're also saying that you
19 don't have to establish --

20 MR. CHIZEWER: Not in any sort of heightened way.

21 THE COURT: I understand that. It's preponderance,
22 that's all, but you do have to establish jurisdiction as a
23 first to file, right? You're just disagreeing as to what it
24 takes to establish that.

25 MR. CHIZEWER: Certainly what I'm arguing now is, yes,

1 what it takes to establish first to file.

2 THE COURT: I'm sorry if I'm backpedaling, but I'm
3 really so taken by surprise by the first position.

4 MR. CHIZEWER: I guess I was taken by surprise by
5 Ven-A-Care's assertion in their brief, something I hadn't heard
6 before, which is that we have some kind of heightened burden to
7 prove and to establish jurisdiction, even at a point in the
8 case where the other parties had gone through the case without
9 ever contesting jurisdiction. So that's all I'm trying to say.

10 THE COURT: So you're just talking about the
11 heightened burden. Okay, I get that. All right, thank you.
12 And so, anyway, so now you're basically saying *Duxbury* rules
13 the day for you because even though Ven-A-Care basically
14 clearly puts out the broad outlines of the fraud, that you
15 provide the meat on the bones, you provide the details.

16 MR. CHIZEWER: The essential facts.

17 THE COURT: The essential details as to how you could
18 prove up the fraud.

19 MR. CHIZEWER: That's right, because, I mean -- and
20 it's not just on the margins, your Honor, because they have
21 made no allegations and even after all this time submitted no
22 evidence really that Ven-A-Care ever even purchased or filled a
23 prescription for Advate, or even Recombinate for that matter.
24 And they have no evidence that they spoke to Baxter, that
25 Baxter talked to them about what it is their pricing strategy

1 was, or how they were reporting to FDB. All they know is after
2 the fact what the spread was, and I don't think that gets them
3 there.

4 It's also interesting to note that Ven-A-Care had
5 taken the position in their earlier filings in these proceedings
6 that they didn't even believe there was value to the Advate
7 claims. On Page 4 of a previous filing they point out,
8 "Ven-A-Care also disagrees that the Advate claims were of
9 sufficient value to provide a basis for Rule 60(b)(6) relief or
10 a determination that the \$30 million Baxter settlement was not
11 fair, adequate, or reasonable. In view of the extensive
12 factual record and case law developed in this MDL, the
13 viability of certain pharmaceutical pricing qui tam claims
14 occurring after --"

15 THE COURT: You're reading way too fast.

16 MR. CHIZEWER: I'm sorry.

17 THE COURT: The court reporter.

18 MR. CHIZEWER: Basically on Page 4 of the document
19 that they filed on October 5, '12, in response to our 60(b)(6)
20 motion, they're essentially taking the position that the Advate
21 claims were of no value; and so it is difficult to understand
22 how they can claim that they were making claims for Advate all
23 along if they themselves didn't believe the claims had value.
24 Now, whether they have value is a completely separate question,
25 but it has nothing to do with first to file. I don't know any

1 first-to-file ruling where the party who's claiming to be first
2 to file is at the same time also saying that "But, by the way,
3 we didn't think those claims had any value." That doesn't make
4 any sense.

5 THE COURT: Not really a big point, I mean. So you're
6 willing to concede factually that the difference between Advate
7 and Recombinate was basically the difference between using
8 animal proteins or not?

9 MR. CHIZEWER: The scientifically --

10 THE COURT: But that otherwise it was an equivalent
11 drug for an equivalent population, sold by an equivalent sales
12 force?

13 MR. CHIZEWER: I think we've tried to be very upfront
14 about what we concede were the similarities and differences
15 between the two drugs. We've put it in our brief.

16 THE COURT: Right, you did, and that's why you're
17 saying there are no --

18 MR. CHIZEWER: We stand by that. I think that Baxter
19 certainly thought that by coming out with this new drug that
20 wasn't manufactured with any human or animal proteins, that
21 this was a huge opportunity for them, that they would be
22 entitled to a premium for the drug, that the drug was priced at
23 a premium for a long period of time for many of their
24 customers. And so there are certainly differences between the
25 two drugs. We don't think you need to rely on those

1 differences. I think it's more about the differences in the
2 nature of the complaints that make Sun and Hamilton, the
3 insiders here, first to file.

4 THE COURT: And about the fraud, as I understand it,
5 one of the arguments was that somehow there was something
6 different about the fraud after 2000, but as I was plunging --
7 that's what I actually thought the hearing was going to be
8 about but clearly not -- that after 2000 essentially, as I'm
9 understanding it, the allegations are, Baxter reported a list
10 price, which was then treated as the WAC, the wholesale
11 acquisition cost, and then bumped up and marked up 125 percent.
12 That's essentially what happened here?

13 MR. CHIZEWER: And, actually, Baxter did more than
14 that. Since they were now faced with the new mandates by DOJ
15 and realized they were going to have to report sort of
16 market-based prices, they instead, in order to avoid doing
17 that, came up with a story that they didn't sell this to
18 wholesalers, and so they didn't have any real market-based --

19 THE COURT: So they reported a list price.

20 MR. CHIZEWER: So they instead quoted a list price,
21 and when FDB asked them, "Well, you can't give us a list price,
22 give us your wholesale price," they told FDB some kind of story
23 about, "Oh, well, we don't sell this to full-line wholesalers,
24 so we can't give you that information." That's a new --

25 THE COURT: But let me just understand. But the list

1 price was then used as a wholesale acquisition cost. Is that
2 right?

3 MR. CHIZEWER: Yes, correct.

4 THE COURT: And then the markup was the 25 percent
5 markup?

6 MR. CHIZEWER: That's right.

7 THE COURT: I mean, that was typical across all the
8 frauds.

9 MR. CHIZEWER: Yeah. Look, I think Baxter would have
10 been fine if they didn't mark up the list price and just used
11 the list price as the AWP price. It's not as if they were
12 trying to even get that extra markup. The point what they were
13 really trying to do was avoid disclosing the real actual price,
14 which was way below even the list price that they reported.

15 THE COURT: I mean, what you're describing is the
16 heart of what happened in almost all of the drugs in the
17 multidistrict litigation case, so that's why I'm trying to
18 understand it. I had thought what you were saying was, there
19 was something really different about what happened here after
20 2000.

21 MR. CHIZEWER: Well, I think what's different is the
22 nature of what Baxter had to do. They had to come up with a
23 different scheme. Before 2000 they were simply reporting their
24 AWP, and --

25 THE COURT: Before 2000 they just reported AWP

1 straight up?

2 MR. CHIZEWER: And people were accepting that. They
3 may have reported an inflated WAC price to go along with it,
4 but there was a general acceptance of whatever was being
5 reported. Afterwards, when they had to certify market-based
6 pricing, they then came up with a new strategy, and that new
7 strategy was to tell FDB to refuse to give them any actual
8 pricing based on the rationale that, oh, they didn't sell these
9 to wholesalers.

10 THE COURT: All right, all right, thank you. Thank
11 you.

12 MR. JACKSON: Good morning, your Honor. So let's
13 level set just a little bit. The Rule 60 motions we've
14 contested, and that's still pending your decision, but it seems
15 very clear that someone not a party to the Ven-A-Care case
16 would have to establish jurisdiction to take a shot at the
17 judgment entered in that case as well as the settlement
18 agreement entered in that case. That's precisely what Sun and
19 Hamilton are trying to do. If they don't have to establish
20 jurisdiction, then anyone on the street could come in and try
21 to attack --

22 THE COURT: I think he's not pressing that. I think
23 the issue is whether it was waived or whether it was a
24 heightened standard.

25 MR. JACKSON: It certainly was not waived, your Honor.

1 There's a footnote in an early brief where we specifically
2 reserved the argument as to Advate. We moved for summary
3 judgment on Advate because of the settlement, but there has
4 never been a waiver, and I agree with you that you have a
5 continuing obligation to determine whether you have
6 jurisdiction.

7 THE COURT: What's the name of that Supreme Court
8 case? I remember people were horrified because an entire
9 judgment was -- Mr. Breen will probably know this by heart --
10 and then at the tail end it was vacated because the Supreme
11 Court decided, oh, no, you don't have jurisdiction as it turns
12 out.

13 MR. BREEN: Judge, that was the *Rockwell* case.

14 THE COURT: I knew you'd know the name of it.

15 MR. BREEN: Painfully, your Honor. That was the
16 *Rockwell* case. And, importantly, that was a direct appeal. It
17 was not a Rule 60 attack where the presumption of jurisdiction
18 then attaches. Otherwise, we'd always be having settlements
19 set aside. *Rockwell* was in the silo. In other words, *Rockwell*
20 was a case --

21 THE COURT: I remember it. Thank you. I just wanted
22 to make sure that we all knew the name of the case. All right,
23 I'm sorry to interrupt you, but --

24 MR. JACKSON: That's okay, your Honor. And I don't
25 think anyone in this courtroom disagrees with what the standard

1 is, whether it's *Duxbury* or Judge Stearns's or Judge Zobel's
2 decisions in *Barts* or *Heinemann Gupta* or *Organon*. That is, if
3 the first-filed complaint identifies the essential facts or the
4 scheme that would put the government on notice to launch an
5 investigation, then there's no jurisdiction over the
6 second-filed complaint. And we've tried to lay out in our
7 brief precisely why the allegations, both AWP and WAC
8 allegations, where the overlap is, and it's the scheme. What
9 we've heard so far this morning is the assertion that somehow
10 Baxter gave inaccurate information to First DataBank upon which
11 reimbursement would be made and those prices were not real. In
12 fact, you've said that this morning to opposing counsel.

13 I think you can start your analysis with their brief.
14 There's a huge concession in it, and I'll read it.

15 THE COURT: And, by the way, can I say, I fully
16 appreciated Sun/Hamilton's brief because I thought it was a
17 very honest brief in terms of it conceding what was appropriate
18 to concede and then making as strong an argument as they could.
19 So I thought that probably eliminated the hearing that we have
20 here today because that was -- in terms of being honest about
21 the presentation of the facts, so --

22 MR. JACKSON: You spoke too soon, Judge. I was going
23 to commend them for this sentence: "No doubt, the Ven-A-Care
24 complaints were sufficient to point government investigators in
25 the general direction of the fraud which Baxter eventually

1 deployed with respect to Advate." So on the front end, I think
2 that's a huge concession.

3 On the back end, a document attached to our pleadings
4 and to Ven-A-Care's pleadings is a September, 2004 document
5 that would show in fact the federal government was looking at
6 our drugs, our therapies, both Recombinate and Advate, and
7 trying to assess damages. So that's how you can bookend your
8 analysis.

9 And in the middle, your Honor, and, again, whether you
10 apply Judge Stearns's or Judge Zobel's analysis or your own
11 analysis in *Abbott*, what you have are uncontroverted facts as
12 follows: Baxter Bioscience produces Recombinate and Advate.
13 It is marketed to the same providers. It is sold to the same
14 patients for the same disease state. The only difference is
15 that Advate is safer. It eliminated any human or animal
16 proteins, either in the manufacture or in the stabilization of
17 the product. It's the same drug. It's the same molecule
18 designed to prevent hemophilia or to help hemophilias. So when
19 you look at those cases, whatever facts they say they're trying
20 to add, I would direct you and suggest that you consider those
21 cases that talk about, a couple additional facts or a richer
22 story are not enough.

23 THE COURT: So I guess, now that I understand there
24 are no disputed facts and I get exactly what this is for,
25 essentially what Ven-A-Care does is, it creates the spread, it

1 tells me about the spread, and that you would say is enough to
2 do the essential facts. Whereas he, Mr. Hamilton, is the
3 person who provides the story; how it happened, the proof in
4 the pudding, basically sketches out the whole conspiracy or the
5 fraudulent scheme. So you're saying that you don't need that?
6 You just need the spread?

7 MR. JACKSON: Well, two things, Judge. I think
8 Ven-A-Care's complaint was broader than that. And goodness
9 knows, we tried to dismiss that complaint for lack of
10 specificity, and this Court would not dismiss it. And it's
11 more than just AWP. It was AWP and WAC. And again I refer you
12 back to our brief and our table. And it was more than just one
13 drug. It was a variety of Baxter therapies, including several
14 hemophilic therapies. They laid out the scheme that would put
15 the government on notice sufficiently --

16 THE COURT: "They"?

17 MR. JACKSON: "They" Ven-A-Care -- in order to launch
18 an investigation. I love the use of that phrase in the cases,
19 "launch an investigation." And we have actual evidence that
20 that occurred, and that occurred prior to the date of their
21 complaint.

22 I don't think you have to get there. That's not what
23 the case law says. If the Justice Department had understood or
24 if you could look at the allegations of the complaint and the
25 other evidence that we've provided and say, yeah, those

1 overlap, then it's precisely the kind of case that the
2 first-to-file statute was designed to eliminate; and if there
3 is no jurisdiction over them, then they can't try to attack the
4 Ven-A-Care settlement or judgment.

5 And as to Mr. Hamilton, they focus a lot on what
6 happened in 2000, 2001, and allege communications about
7 Recombinate, not a thing about Advate. So I think that's very
8 important for you to consider. So whatever Mr. Hamilton says,
9 it has to do with Recombinate, a drug that was specifically
10 identified in the Ven-A-Care case. They're in fact trying to
11 take what happened in 2000 and 2001 and project it into the
12 future. Well, goodness, isn't that a perfect example of what a
13 first-to-file defense or bar is supposed to prevent? "I have
14 some facts now regarding Recombinate. Let's see if I can
15 impose a fact pattern forward in time." That's why these
16 Advate claims should be dismissed for jurisdictional reasons,
17 and we don't even have to get to the Rule 60 motion.

18 So, your Honor, I think if you take a look at -- oh,
19 there was one other thing. You had asked about what was being
20 reported. Baxter was reporting list, and then when Advate came
21 around, Baxter reported a WAC; and their reporting complied
22 with the instructions by First DataBank. But, in any event,
23 this is a complaint by both plaintiffs --

24 THE COURT: So you're saying that for Advate they
25 reported a WAC, not a list price?

1 MR. JACKSON: It was a list price from -- it was a
2 list price. It was a list price.

3 THE COURT: But then it was treated by First DataBank
4 as a WAC --

5 MR. JACKSON: And increased by 25 percent.

6 THE COURT: -- and then marked up. That's what
7 happened across many drugs.

8 MR. JACKSON: And, your Honor, and that's what's been
9 alleged in this courtroom since 2000 whatever, however long
10 I've been walking up here and arguing cases in this matter. So
11 we think, under applicable case law that I think we have, you
12 know, unanimous agreement on what that case law is applied to
13 the facts of this case, and the fact that Advate and
14 Recombinate are essentially the same thing save for an
15 increased safety factor, that the Department was put on notice
16 and could have launched an investigation, which they did.

17 THE COURT: So when *Duxbury* is distinguished on the
18 grounds that, well, that was sort of the sky-high view of the
19 fraud, and in *Duxbury* the second complaint provides what the
20 First Circuit said were the essential details to prove up the
21 fraud, how would you say that was different?

22 MR. JACKSON: I direct you to Page 33 of that
23 decision. The Court talks about similarities but not a
24 sufficient scheme. And I think that's how you have to read the
25 *Duxbury* decision and those pages and how they would talk about

1 the off-label allegations that were contained in the first
2 versus the second. And we've got that here. The allegations
3 in Ven-A-Care's case is much broader. It includes WAC and AWP,
4 inflated pricing used to induce greater reimbursement. That's
5 what we've been litigating here forever and a day in a
6 complaint that was filed by Ven-A-Care in 1995, which I think
7 sets the world record in qui tam complaints under seal. It's
8 been litigated for a long time, long before the complaint was
9 filed in 2005.

10 THE COURT: You mean number of them or length of time?

11 MR. JACKSON: The complaint against Baxter was under
12 seal for ten plus years while the government was investigating,
13 a side fact, but I think it's -- I've been doing this for a
14 long time, and I've never heard of a complaint under seal for
15 ten plus years.

16 THE COURT: Okay. I think, just set the record, it
17 wasn't here in Massachusetts, right?

18 MR. BREEN: No, your Honor.

19 MR. JACKSON: No, your Honor.

20 MR. BREEN: We filed it in the Southern District of
21 Florida, and we filed companion cases, as your Honor knows, in
22 a number of states.

23 THE COURT: One of them was Massachusetts.

24 MR. BREEN: No, we didn't. Massachusetts does not
25 have a qui tam statute, your Honor. We assisted the

1 Massachusetts --

2 THE COURT: The federal, wasn't there a federal case
3 filed?

4 MR. BREEN: We did. In 2000 we filed the case on oral
5 medications here in Massachusetts. The one in Miami, as your
6 Honor knows, was on the I.V. infusion drugs, biological
7 products and what have you.

8 Your Honor, I'd like to address the *Duxbury* issue
9 first, if I may, and I'll quote from my adversary's brief at
10 Page 10, and he quotes *Duxbury* accurately. And the *Duxbury*
11 court said, "In fact, the original complaint nowhere refers to
12 an 'off-label promotion scheme.' Thus, we conclude that the
13 original complaint cannot trump the Blair complaint for
14 purposes of the first-to-file rule."

15 And the important thing about *Duxbury* is, the first
16 complaint didn't say they committed off-label marketing. It
17 didn't talk about the fraudulent scheme. And as your Honor is
18 well aware and we've been discussing, and I don't think there's
19 any disagreement, Ven-A-Care articulated, blew the whistle --
20 call it what you will -- the fraudulent scheme in June of 1995.
21 And that was after a lot of investigation, a lot of its own
22 internal information because it had access to the actual market
23 prices; and it investigated every state reimbursement
24 mechanism, which hasn't been done here, to see how causally
25 this was causing Medicaid fraud and injuries. It investigated

1 First DataBank, how are they doing things? And the fact of the
2 matter is, it was different for different drug companies at
3 different times for different drugs. Sometimes they'd use a
4 list price and make that an AWP. Sometimes they'd take a WAC
5 and mark it up. Sometimes they'd take wholesale and net and
6 mark it up. It depended. Ven-A-Care -- and they're all here,
7 Judge -- the officers of Ven-A-Care, none of them has ever
8 worked inside a drug company. Ven-A-Care is never going to
9 file a complaint that says, "We were there when the pricing
10 committee met, and they called First DataBank, and they decided
11 to publish a list price." Ven-A-Care is never going to have
12 that information.

13 The information Ven-A-Care had, from the perspective
14 of the relator, was a small infusion pharmacy that knew the
15 actual prices that were being charged, had access to them, knew
16 in all instances that the manufacturer was aware, either
17 directing or at a minimum aware of how First DataBank was using
18 their inflated price reports to cause inflated AWP's to go to
19 the states. So in all instances, the manufacturers were
20 reporting inflated pricing to First DataBank, and Ven-A-Care
21 was very clear about that. And before we could get out from
22 under seal, Congress began to investigate this. The Ven-A-Care
23 witnesses were the lead witnesses in the Congressional hearings
24 that led to the Medicare Modernization Act and changes to ASP
25 and what have you, and the government kept our case under seal

1 for a long, long time. Different cases came out at different
2 times, and we did the best we could. Baxter was the last one
3 to come out. But during that period of time, once Congress
4 investigated it, that's when you saw the class action cases
5 started which began this multidistrict litigation. The first
6 time a Ven-A-Care case showed up was our California case
7 because it happened to be the first one to come out that was in
8 Federal Court.

9 So, your Honor, this scheme, this fraudulent scheme
10 that would be the equivalent to off-label marketing in *Duxbury*,
11 this scheme has been out there since 1995 when Ven-A-Care first
12 filed an action against Baxter. The quote to our brief where
13 the Tenth Circuit and the Third Circuit in *SmithKline* say you
14 need only look at the two complaints, that's true; you've got
15 to look at the two complaints to see if they allege the same
16 fraudulent scheme. But it's Sun/Hamilton saying that, "Oh, no,
17 there's a different detail here. Advate is a different drug."
18 And so --

19 THE COURT: Well, that's fair. I mean, that's what
20 made me go beyond just the complaint because I in other
21 contexts have said, and you've said it, different drugs have
22 different schemes, so we have to go beyond just the complaint.

23 MR. BREEN: Absolutely, and that was the right thing
24 to do, and we did. And unlike the *Abbott* case where we had
25 a -- we filed against *Abbott* in Miami on all their I.V. drugs

1 and solutions, and then the Abbott division that made oral
2 medication, in that case, the erythromycin, was part of our
3 Boston case; two different divisions, two different sets of
4 people, two different marketing methods and what have you. So
5 those were two different cases, and your Honor ruled that they
6 were two separate ones from a first-to-file perspective.

7 But here, the Miami case was the infusion pharmacy
8 case, it was the biological products case; and Ven-A-Care, as
9 you can see in the attachments to Dr. Lockwood's declaration,
10 did directly deal with Baxter on a lot of its products. We
11 don't have any dealings directly with Baxter on Recombinate,
12 but they dealt with Baxter on a lot of its products. And a lot
13 of the drugs that were included in Ven-A-Care's cases that have
14 been settled and recovered in excess of \$3 billion to date, all
15 of those cases had drugs that Ven-A-Care may not have purchased
16 on a given time, but it had the critical piece of information,
17 and that was access to actual market prices.

18 Now, your Honor, we're dealing with a first-to-file
19 case here. We cited the law on burden and attacking a final
20 judgment. It's over, a settled case dismissed by a final
21 adjudication, which is where we are. If somebody wants to
22 attack those types of cases under Rule 60 and then claim that
23 the court was without subject matter jurisdiction, the standard
24 is and always has been, you just can't come in and say that. I
25 mean, if it was never finally adjudicated in the case, there's

1 a strong presumption that the court had jurisdiction. So
2 they've got to show that we didn't even have an arguable basis
3 under the Rule 60 case law. But we've stated that in our
4 brief, and that's the heightened standard. But I think for
5 purposes of this hearing, I think only one relator can be first
6 to file.

7 THE COURT: So when did Advate come out? It came out
8 in --

9 MR. BREEN: It was approved by the FDA in July of
10 2003.

11 THE COURT: Right.

12 MR. BREEN: Ven-A-Care filed its last amended
13 complaint under seal on December 11, 2002. Five days after
14 that -- and this is all attached to the materials that have
15 been stipulated to before your Honor -- five days after that
16 the Baxter pricing team is meeting and talking about what their
17 strategy is going to be for marketing Advate along with
18 Recombinate, which was pled in Ven-A-Care's case, and how the
19 whole strategy was going to be to try to convert patients from
20 Recombinate to Advate because Advate was more profitable. So
21 every document that talks about Recombinate after December 11,
22 2002, is going to talk about Advate.

23 The standard for first to file is whether the
24 government's investigation would have reasonably led to include
25 this additional drug. And the government doesn't have to go

1 across divisions and spend a lot of money looking for needles
2 in haystacks, that's correct, but it is incomprehensible that a
3 government investigation of Recombinate that was re-pled on
4 December 11, 2002, and the government kept that case under seal
5 for more than seven more years investigating, it is
6 incomprehensible that it would not have also included the
7 Recombinates, any relator Recombinate.

8 THE COURT: In fact, there's some evidence it did
9 include it, right?

10 MR. BREEN: Absolutely, Judge. So that's the basis.

11 Now, let's talk a little bit about the policy behind
12 first to file. First to file is not Rule 9(b). Judge Stearns
13 has ruled that in this district. He's followed the correct law
14 in the D.C. Circuit under *Batiste*. The *SmithKline* case, the
15 Third Circuit case, *LaCorte/SmithKline*, that *Duxbury* relies
16 upon was a different lab test that was never mentioned, just
17 like a different drug. It was a different lab test that was
18 not mentioned in the earlier relator's complaint, and the
19 *SmithKline* court --

20 THE COURT: The narrow legal issue here is, it's a
21 different drug but similar, or substantially the same but not
22 the same.

23 MR. BREEN: Exactly, but in *LaCorte/SmithKline*, it was
24 a different lab test, and so the court said that's just a
25 different detail. They said that there was a false claim

1 scheme regarding lab tests, so they would have found that lab
2 test too. So that's the case that the First Circuit relies
3 upon in *Duxbury* the most is this *LaCorte* Third Circuit case,
4 different lab test.

5 But let's talk about why that's correct under the
6 first-to-file bar. Why should that be the policy? Because if
7 you look at Sun/Hamilton's arguments right now, they're
8 correctly saying that because Sun particularly was inside a
9 drug company in 2004, 2002 to 2004, that she had access to
10 information about precisely how Baxter was dealing with its
11 pricing. And that's 2004. But, your Honor, the first-to-file
12 bar is not one that says you've got to have the relator with
13 the most information. The first-to-file bar says you want to
14 encourage a relator with enough information to come forward and
15 blow the whistle early so that we don't have a perpetuation of
16 the fraud.

17 Ven-A-Care blew this whistle in 1995, and if you look
18 at Dr. Lockwood's declaration, you'll see attachment after
19 attachment of just some of the briefings we gave the states.
20 We briefed every state in this union, either going to their
21 capital, or they all came to Washington in March of 1998. We
22 briefed them all at one time about this fraud scheme. We
23 briefed the main committees of Congress about this fraud
24 scheme.

25 So Ven-A-Care used what it had, which was the actual

1 market pricing and its knowledge that the drug companies had
2 full knowledge of what First DataBank was doing and were
3 utilizing that and how it was impacting the market. That was
4 the fraud scheme. Had we concluded in 1995 that you've got to
5 be inside a drug company and you've got to have perfect
6 information, there would have never been an AWP case. The next
7 relator would be discouraged from filing it because you've got
8 to have the most information; and that's not the law, and
9 that's why it's not the law, and Congress didn't want that to
10 be a law in the first-to-file bar. It's to come forth with a
11 fraudulent scheme.

12 Ven-A-Care didn't throw a bunch of stuff up on the
13 wall and see if it would stick. Your Honor has -- you and the
14 state courts have reviewed and scrutinized pleading after
15 pleading after pleading in the Ven-A-Care cases, and it's been
16 sustained that we pled the fraud scheme.

17 THE COURT: All right, I guess at heart what's
18 troubling here is that when you all knew that you were
19 essentially quashing the Sun/Hamilton case, that I wasn't
20 dealing with this issue a long time ago.

21 MR. BREEN: And, your Honor, I think that's the
22 coordination. And I said in November, your Honor, had I to do
23 it all over again, I think I would have looked at it
24 differently, but I was representing the earlier relator. It's
25 not that we didn't know about each other. Sun/Hamilton counsel

1 and me, I mean, we've known each other for years. The
2 government did limited unsealings so we could talk to each
3 other years ago before either one of these cases were unsealed.
4 And so it's not like we didn't know each other, didn't know
5 about each other's cases. Sun/Hamilton, as you now know, they
6 had our settlement the day it was filed. Your Honor has heard
7 our argument about why we believe that settlement is limited to
8 our fraud scheme that we pled, and I'm not going to go back
9 into all that now, so --

10 THE COURT: But that would include Advate, right?

11 MR. BREEN: Well, it looks like it would now, but,
12 your Honor, we never drilled down on Advate like we have now.
13 And what I always thought was, there's an argument on Advate,
14 and it was an unresolved issue as to Advate, but that's often
15 the way it is when you settle a case.

16 THE COURT: Has anyone been in touch with the
17 government? It may well be the reason they haven't filed
18 anything is because they actually did consider Advate, as it
19 turns out in the submission, right?

20 MR. BREEN: Your Honor, Mr. Henderson when he was here
21 in November -- and I think we should even go back and read what
22 he said -- he stated the government's position very clearly,
23 and that was: It's the government's position that if
24 Ven-A-Care was first to file as to Advate, it was settled.
25 It's the government's position that Ven-A-Care wasn't first to

1 file as to Advate; it wasn't settled. And it's his position
2 that --

3 THE COURT: Yes, right, but just surprisingly they
4 didn't take a position on it. They're sort of washing their
5 hands of it, and it may well be because Advate was actually
6 considered because that's what it shows, right?

7 MR. BREEN: But it was also his position, I think to
8 correctly report, that I believe it's the Department's position
9 from what Mr. Bunker said -- I don't want to state the
10 Department's position -- but my recollection is that it's not
11 whether the government considered the drug. It's whether a
12 reasonable investigation would have encompassed it.

13 THE COURT: Right, I get that, if in fact it did. So,
14 anyway, all right, thank you.

15 Did you not to respond at all?

16 MR. CHIZEWER: I'll be very short, your Honor. First
17 of all, I think it's very dangerous for any party to try and
18 fasten on some very limited boilerplate phrasing in any one of
19 these cases, whether it's "launch the investigation, notice to
20 the government, essential facts." That language you can turn
21 to any party's favor. What the Court really needs to do is
22 look at the underlying facts of every single one of those cases
23 to see what types of relators are the ones that are coming out
24 ahead in the first-to-file determinations, and I don't think
25 you will find any relator regarded as first to file when they

1 didn't have any direct knowledge of the underlying conduct that
2 was going on inside of the company. Whether it was because
3 they were an insider or a customer, whatever their basis was,
4 they had the direct knowledge of what was going on inside the
5 company. Granted, Ven-A-Care had some limited information that
6 they were able to run with and then have the government
7 investigate, and they learned a tremendous amount and did a
8 tremendous service for the government, but they weren't faced
9 with any first-to-file challenges for the great majority. In
10 fact, I think we are the only first-to-file challenge that has
11 been made.

12 And in terms of a policy ground, the policy is equally
13 important, actually, more important on the other side, which
14 is, if a single relator comes forward with a limited amount of
15 information, it then applies industrywide. If they get to
16 essentially block out anybody else from any other company of
17 coming forward with the underlying specific information, then
18 the government is left to go company by company and do, you
19 know, CID, an interview by interview and go company by company
20 without any of the real guts of the fraud, the real inside
21 information. They'd be left without that because no one is
22 going to want to come forward if they think that just somebody
23 can, you know, quickly race to the courthouse with their
24 limited amount of information and block out everybody.

25 So if you look at the information that Sun/Hamilton

1 brought forward here, in particular, after a period of time
2 where the pricing information changed, that's why they would be
3 regarded as first to file here; and that's consistent with
4 every one of the cases, no matter which way they come out.

5 I also just wanted to bring up the point that I don't
6 think *Rockwell* is the case that your Honor was thinking about.
7 *Rockwell* is an FCA case, and ultimately the court determined
8 that there was no jurisdiction in that case, but that was based
9 on an argument that had been made by the defendant from the
10 very beginning of the case that there was a public disclosure.
11 And that argument was made at the very beginning of the case
12 and carried all the way through and ultimately won with the
13 Supreme Court, but there was no reexamination after the fact,
14 after a judgment had been entered on completely other grounds
15 in the defendant's favor like we have here. So there may be
16 another case about reexamining jurisdiction, and I apologize,
17 your Honor, that I don't know what it is.

18 THE COURT: No, no, I think *Rockwell* is it. But the
19 problem with this case is, there is no other case like this
20 because there is no other case like this. At the end of the
21 day, you should have been notified right from the get-go. We
22 should have been resolving this. You should have objected when
23 you saw it. I mean, this came up backwards. And so I don't
24 know that anyone has cited a case that's really just like this
25 one, right? So the question is, can you move to intervene to

1 vacate a judgment unless you show that you had jurisdiction to
2 begin with?

3 MR. CHIZEWER: Well, let me just address that issue.
4 We're not contesting the -- when we filed our Rule 60(b)(6)
5 motion in the Ven-A-Care matter, we were not contesting the
6 Court's jurisdiction over the Ven-A-Care matter. We were
7 simply saying that the ultimate settlement in that case, either
8 the relators were entitled to a portion of it or the settlement
9 itself needed to be reexamined as to the amount within that
10 case. We were not contesting the jurisdiction of the court in
11 that case.

12 The other side then decided that we didn't have
13 jurisdiction to come in and contest the settlement because
14 there was no jurisdiction in our own case, which is ironic
15 because Baxter asked for a judgment in that case and won a
16 judgment in that case without raising any jurisdictional issue
17 on the Advate claims.

18 THE COURT: Because it was a simple settlement as
19 opposed to -- they did preserve it in a footnote --

20 MR. CHIZEWER: No.

21 THE COURT: They said they did. Is that wrong?

22 MR. CHIZEWER: Well, they filed a first-to-file motion
23 and only made it with respect to Recombinate. There's actually
24 briefing on that. And then I think there was no formal, you
25 know, opinion on that issue.

1 THE COURT: I know, it's hard to say it's a waiver
2 when -- the settlement was simple. Actually we spent -- the
3 settlement issue wasn't a difficult one. It was
4 straightforward. It just included the -- it included the code,
5 and there it was.

6 MR. CHIZEWER: I think what was confusing to both the
7 government and Sun/Hamilton, and perhaps even Ven-A-Care, about
8 the settlement was not the scope of the release but the parties
9 who were granting the release, because the government never
10 actually granted a release. Only Ven-A-Care was the one who
11 was releasing the parties, and we did not believe that that
12 settlement had anything to do with releasing Sun/Hamilton's
13 claims over any of the drugs. I understand that's water under
14 the bridge, but in terms of --

15 THE COURT: Well, I don't know that Sun/Hamilton did
16 release it. Ven-A-Care and the government did. I don't mean
17 you released anything. You weren't a party to it.

18 MR. CHIZEWER: I'm only saying that as to why -- when
19 you say we should have objected right away, that's the only
20 reason: It was only a two-week period. That's the only reason
21 we didn't object right away is because we didn't think the
22 settlement was covering our claims. In any event --

23 THE COURT: Well, I understand why everyone missed it
24 because it was under a code, a labeler code. I was very angry,
25 if Baxter remembers, at the time. I've been annoyed at

1 Ven-A-Care. I thought you should have been straight up told
2 rather than you had to read a labeler code. That's why we're
3 here now. I mean, I didn't say you waived it, right? I have
4 never said that, but --

5 MR. JACKSON: Your Honor, and there was also,
6 remember, the language in the settlement agreement that said
7 "all drugs." So it was simple and straightforward, and you've
8 found that now several times.

9 THE COURT: I do think it's simple and straightforward,
10 but that said, I'm now in this procedural hassle of how do you
11 get back into it?

12 MR. CHIZEWER: I just want to be clear, really, that
13 we were not and are not contesting -- except for the fact that
14 this first-to-file issue came up and we have to address it, our
15 Rule 60(b)(6) motion is not a jurisdictional motion at all. It
16 does not contest the jurisdiction of the Ven-A-Care court. It
17 simply seeks to either get a portion of the settlement proceeds
18 and/or reexamine the settlement amount within the jurisdiction
19 of that court. We're not contesting the jurisdiction of the
20 Ven-A-Care court. They then raised the first-to-file issue,
21 and so that brings up the jurisdiction of either court, but
22 that does not necessarily need to happen in the 60(b)(6)
23 context.

24 THE COURT: Thank you. Now, let me go off the record
25 for a minute.

1 (Discussion off the record.)

2 THE COURT: So anybody else want anything on the
3 record? I had interrupted Mr. Breen before.

4 MR. BREEN: Yes, your Honor, just very quickly.

5 THE COURT: Just briefly, and then we'll finish up.

6 MR. BREEN: Real brief. I agree that you just can't
7 say there's a whole industry committing a fraud and succeed as
8 a qui tam relator without some information, but Ven-A-Care
9 didn't do that. Your Honor knows we did not sue every drug
10 company in the industry. We brought actions against those
11 companies that we had direct information on their pricing, that
12 we knew how they were communicating through First DataBank and
13 directly with the states. Sun/Hamilton doesn't even allege any
14 kind of fraud against states that were using Baxter's WACs or
15 getting Baxter's prices directly, like Texas. There's a whole
16 lot more in Ven-A-Care's complaints about how we knew the
17 manufacturer was knowingly reporting these false prices. So we
18 didn't just say, "Hey, the industry is lying about AWP." Your
19 Honor knows that. We were very specific about we had to have a
20 price; it had to be over time; it couldn't be just an anomaly.
21 I mean, we did all kinds of things to make sure we had the
22 right defendants. That's it, your Honor.

23 THE COURT: Okay.

24 MR. CHIZEWER: I think that's true for a lot of the
25 Ven-A-Care defendants, that they did have certain knowledge,

1 particularly because of the drugs that they were purchasing, or
2 maybe they were dealing more directly with other defendants;
3 but there's nothing in their complaints with respect to
4 knowledge of Baxter's underlying conduct or reporting
5 information. It's all just supposition from --

6 THE COURT: Thank you. Well, I'll take this under
7 advisement. It sounds as if settlement is not going to happen,
8 at least at this stage, without a ruling. I think everyone is
9 telling me that. And if I'm seeming gloomy, it has nothing to
10 do with this case. It's sort of a gloomy day in Boston right
11 now. And I was sitting here actually reading these briefs when
12 I first heard about the explosions, so I'm feeling pretty
13 gloomy but not about you. This is a very fair legal dispute.
14 And thank you for flying into Boston. I think most of you did
15 that. It's a tough day here.

16 All right, thank you very much. Bye-bye.

17 MR. CHIZEWER: Thank you, your Honor.

18 MR. JACKSON: Thank you, your Honor.

19 MR. BREEN: Thank you, your Honor.

20 (Adjourned, 10:22 a.m.)
21
22
23
24
25

C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I, Lee A. Marzilli, Official Federal Court Reporter,
do hereby certify that the foregoing transcript, Pages 1
through 47 inclusive, was recorded by me stenographically at
the time and place aforesaid in Civil Action Nos. 01-12257-PBS,
08-11200-PBS, and 10-11186-PBS, In Re: Pharmaceutical Industry
Average Wholesale Price Litigation, and thereafter by me
reduced to typewriting and is a true and accurate record of the
proceedings.

Dated this 30th day of April, 2013.

/s/ Lee A. Marzilli

LEE A. MARZILLI, CRR
OFFICIAL FEDERAL COURT REPORTER